No. 98.

Brf. of Atty. Gen.l (Collins & Pradt)
for Appellees.

Filed Jan. 4, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

SAMUEL MONROE AND DAVID M. RICHARDSON, late copartners trading as Monroe & Richardson, appellants,
v.
THE UNITED STATES, APPELLEES.

No. 98.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF ARGUMENT ON BEHALF OF THE UNITED STATES.

FRANKLIN W. COLLINS,
Special Attorney.

LOUIS A. PRADT,
Assistant Attorney-General.

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STATEMENT.

The essential facts in this case can not be more fairly or succinctly stated than as found in the language of the Court of Claims in its opinion herein as delivered by Mr. Chief Justice Nott, wherein in the first paragraph thereof the court says:

> On the 1st of August, 1892, the contracting officer of the United States mailed the contract in suit at Chicago, duly executed by both parties, to the Chief of Engineers in Washington for his approval. It was immediately disapproved and returned to the officer with

instructions to readvertise the work. This was done and the work was subsequently let to other parties. The contractors bring their suit accordingly for their losses sustained and gains prevented. (35 C. Cls., p. 203.)

ARGUMENT.

I.

THE EXISTENCE OF AN EXPRESS CONTRACT IS NOT SHOWN BY THE RECORD.

The last clause of the last paragraph of the statement which precedes the brief of the learned counsel for the appellant (pp. 2 and 3, appellant's brief) does not correctly recite the facts. The learned counsel states that the Court of Claims "found as a conclusion of law that the failure of the Chief of Engineers to write upon the contract the word 'approved' rendered it invalid, and therefore dismissed the claimant's petition;" whereas, the Court of Claims did not narrowly find as a conclusion of law that "the failure of the Chief of Engineers to *write upon the contract the word 'approved' rendered it invalid;*" and said language nowhere appears in the findings of said court, its conclusions of law, or in the opinion accompanying the same, nor can the language used by the Court of Claims in connection with the said case be interpreted in this manner.

The Court of Claims simply stated as its conclusion of law upon the findings of fact that "the petition should be dismissed." The opinion of the court goes further and distinctly declares that it (meaning the

contract) was immediately disapproved (35 C. Cls. R., 203), and further held that in case of a written formal contract, where the final act of the parties expressly provided in so many words that this contract shall be subject to the approval of the Chief of Engineers, it is impossible for the court to hold that these words *meant* nothing or that they meant that a prior contract had been approved by the Chief of Engineers, and that the court must reiterate the decision in *Darragh's case* (33 C. Cls. R., 377) and say that where a contract entered into by a subordinate is in its terms subject to the approval of his superior, approval is a condition precedent to the validity of the agreement (25 C. Cls. R., pp. 203 and 205). So that the question in controversy is not simply, as stated by opposing counsel, that the mere failure of the chief of engineers to write upon the contract the word "approved" rendered it invalid, but is much broader and it is rather to be stated in this way: *When a contract, in its terms, is subject to the approval of the Chief of Engineers, and that approval is not obtained, the agreement, in the absence of such approval, is not a valid, binding, and subsisting contract between the parties.* Certainly, without the approval specified it lacks one of the essential ingredients of a contract. In this case the approval of the Chief of Engineers was a condition precedent to the validity of the contract, and the record in this case shows that this approval was never obtained. On the contrary, it appears that when the contract was presented to the Chief of Engineers for approval it was immediately disapproved and the

appellant notified accordingly. That this approval is a condition precedent to the validity of a contract in which it appears as one of its clauses is so clear and elementary as a principle of law that the citation of authorities to support it would seem to be almost superfluous. The Court of Claims had previously announced the same doctrine in the case of *Darragh* v. *United States* (33 C. Cls. R., 377). That suit was almost identical with the one at bar. This court has uniformly declared itself in the same manner. In the case of *Ware* v. *Allen* (128 U. S., 593), which was brought in the circuit court of the United States for the southern district of Mississippi, Ware was the plaintiff in the court below, and from a decree dismissing his bill he appealed to this court. The suit was brought on a promissory note, which was obtained by the appellant of the appellees upon the distinct understanding that the same was to be of no effect unless, upon an after consultation with two attorneys whom the appellees desired to consult, the appellees should be assured by said attorneys, and each of them, that certain proceedings connected with the collection of a claim held by the appellees against the appellant's brother were lawful, and the attachment which had issued from the court could be enforced.

As soon as the defendants could do so they asked one of the attorneys mentioned for his opinion, and he declined to give it, or to take any part in the matter.

The other counsel was seen and disapproved of the

arrangement in emphatic terms, and advised the defendants to have nothing to do with it.

The testimony established this agreement made before the delivery of the instrument sued on—that the defendants were to have opportunity to consult their counsel as above, and as to the validity of the transaction, and that if their advice was adverse then the instrument given by them was to be of no effect.

It further established that one of the counsel referred to advised them that the transaction would not stand the test of a legal investigation.

The court in that case, in rendering its opinion, through Mr. Justice Miller, said:

> We are of opinion that the evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred.

The same reasoning is applicable to the present suit, and in a stronger sense, in that the condition precedent of the contract herein was embodied in and formed a part of the written contract, whereas in the case cited the agreement whereby the transaction was to be submitted to counsel before the contract should be binding on the parties was established by parol testimony.

Here was a condition, clearly expressed, which must be complied with before the agreement between the parties should become a valid and binding contract. It was essentially a condition precedent. (Am. and

Eng. Ency. Law, 2d ed., pp. 118 and 119, and footnote 4.)

In *Redmond* v. *Etna Ins. Co.* (49 Wis., 43), the court said:

> A condition precedent calls for the performance of some act or the happening of some event after the terms of the contract have been agreed upon, before the contract shall take effect. That is to say, the contract is made in form, but does not become operative as a contract until some future specified act is performed or some subsequent event occurs. (*Wellington* v. *West Boylston*, 4 Pick. (Mass.), 101; *Hunt* v. *Livermore*, 5 Pick. (Mass.), 395; *Jarvis* v. *Rogers*, 3 Vt., 339.)

A strikingly similar case to the one under consideration is that of the *Governor, Guardians, etc., of the Poor* v. *Petch* (28 Eng. L. and Eq. R., p. 470). In that case the action was brought against the defendant, a butcher, for breach of his contract to supply the workhouse at Kingston-on-the-Hull with meat pursuant to his contract. Among the pleas interposed by the defendant was that of nonassumpsit.

The plaintiff being desirous of securing tenders for meat, etc., for the use of the poor (syllabus), issued advertisements stating that they would receive tenders for the supply of the workhouse with meat for three months, from 30 to 50 stone (setting out the description of the meat); that sealed tenders were to be forwarded to the clerk, and that all contractors would

have to sign a written contract after acceptance of tender. The defendant wrote the plaintiffs as follows:

> I propose to supply your house with meat according to advertisement, for the ensuing three months, at 6d. per pound.

The defendant's proposal was accepted, and he was informed that he was appointed butcher, upon which he immediately declined the appointment:

> Held, that the transaction amounted merely to a proposal for a contract, and that there was no binding contract until a written agreement had been signed.

Likewise the Court of Claims held herein that there was no binding contract between the appellants and the United States until the contract had been approved by the Chief of Engineers, which was never done.

The case of *Wilson* v. *Powers* (131 Mass., 539) is of interest, and it also sustains the Government's contention.

This was a suit brought against a surety on a promissory note, which surety set up as a defense that he was discharged from liability by a written agreement entered into between the holder and the principal to extend the time of payment. Evidence was offered by the plaintiff that a conversation took place at the time of the delivery of the agreement by the holder to the principal, and of a conversation between them prior to the date of the agreement, to the effect that it should become binding only on the assent of the surety, and the court held such evidence admissible.

The supreme court of Massachusetts, speaking through Devens, J. (131 Mass., pp. 540 and 541), said:

> At the trial the defendants relied upon a certain instrument as discharging them from their obligation as sureties, by which Wilson, the promissee of the note, as it was contended, agreed to extend the time of payment of the note to the principal, defendant, without the assent of the sureties. It was contended by the plaintiff that the instrument signed by Wilson was delivered by him as a proposition merely, and upon the agreement that it should become binding only upon the assent of the sureties thereto. The manual delivery of an instrument may be proved to have been on a condition which has not been fulfilled in order to avoid its effect. This is not to work any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced. (*Whittaker* v. *Salisbury*, 15 Pick., 534; *Davis* v. *Jones*, 17 C. B., 625; *Murray* v. *Earl of Stare*, 2 B. and C., 82; *Pym* v. *Campbell*, 6 E. L. and B. L., 370; *Wallace* v. *Lattell*, 11 C. B. (N. S.), 369.)
>
> Evidence was admitted of the conversation which took place at the time of the actual delivery of the instrument to Welsh by Wilson, and also of a previous conversation before the date of the instrument and before it was written, to the effect that it should become binding only upon the assent of the sureties. The defendants contend that even if all that took place at the time of the delivery was admissible as an explanation thereof and as a part

> of the res gestæ, yet that the evidence of the previous conversation was erroneously admitted. But a previous conversation might, and in this case apparently did, have a direct bearing upon the question whether the delivery was conditioned. Wilson, at the time of the delivery, stated that "this was his proposition, and it was in writing;" and the previous conversation clearly related to such an instrument as a proposal only. Whether the delivery of a paper is absolute or conditional is a question of fact. If it were shown that two parties had agreed that an instrument should be thereafter prepared to take effect only upon compliance with a certain condition or the occurrence of a certain event, and thereafter such an instrument were prepared and delivered, even if nothing was said at the time of the actual delivery, it would be for the jury to say whether such delivery did not take place under and in pursuance of a previous agreement. That a delivery should be conditional it is not necessary that express words to that effect should be used at the time. That conclusion may be drawn from all the circumstances which properly form a part of the entire transaction, whether in point of time they preceded or accompanied the delivery.

So here our contention is that the contract in question was never in fact a contract binding and operative, but merely a proposal for a contract which was never finally and formally accepted, and hence its obligation never commenced. That this contention is

fully justified by the facts in the case is unquestionable. This was a case where the proposed contract expressly provided that the same was to be subject to the approval of the Chief of Engineers. It was therefore understood and agreed by and between the parties thereto that the approval of said officer was to be obtained prior to the operation of said contract. It follows, therefore, that until such approval was obtained the writing between the parties was a mere proposal for a contract, which only became a contract on the fulfillment of the indispensable prerequisite and condition precedent to its validity, to wit., the approval of the Chief of Engineers.

This is exactly in line with the doctrine so frequently announced by law writers and by the courts that "where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed upon." (7 Am. and Eng. Ency. L., 2d ed., p. 140, and footnotes thereto.)

A case which bears a striking similarity to the present suit is that of *Soper* v. *The Buffalo & Rochester Ry Co.* (19 Barb., 310). The syllabus reads as follows:

> The defendants advertised that they would receive proposals on a specified day for clearing, grubbing, grading, and fencing the line of direct railroad between Batavia and Buffalo. The plaintiff and H. submitted proposals for doing the work and entering into a written

contract. On a subsequent day the directors of the defendants had a meeting, at which, for want of time to examine the various proposals which had been made, a resolution was passed that such proposals be referred to the executive committee and superintendent, to close a contract with such of the persons making the proposals and upon such terms as they should consider most advantageous to the interests of the company. It did not appear that the committee ever met or acted upon the matter thus referred to them. Held, that these facts were not sufficient to prove that the plaintiff's proposition was accepted or that a contract was entered into between the parties for the doing of the work, and that the declarations of individual directors of the defendants, made immediately after the close of the meeting at which the propositions were submitted, to the effect that the proposal of the plaintiff and H. were accepted, were not competent evidence to establish that fact.

The court, in its opinion in the above case, delivered through Mr. Justice Strong, among other things, says:

> It was not true that the executive committee and superintendent ever met or acted upon the subject of the proposals. These facts fall entirely short of sustaining the position that a contract was entered into between the defendants and the plaintiff for the doing of the work. The proposition of the latter was not accepted, the directors did not act upon it, except by referring it to a committee, and this committee did nothing in relation to it.

And so in the case at bar, the facts fall entirely short of sustaining the contention of the appellants that a contract was entered into between the United States and the appellants for the doing of the work under the proposed contract. The proposition of the appellants was not accepted, inasmuch as the Chief of Engineers never approved the contract, but, on the contrary, immediately disapproved the same, of which action the appellants were duly and without delay notified.

The same principle finds expression and lends additional weight to the Government's contention in the case of *Sumner* v. *Stewart* (69 Pa. St., 321).

The learned counsel for the appellants relies upon the decision of this court in the case of the *United States* v. *Speed* (8 Wall., p. 84), in which this court, speaking through Mr. Justice Miller (pp. 83 and 84), says:

> The contract was not approved by the Commissary-General.
>
> The agreement contained a provision that it is subject to the approval of that officer. The Court of Claims finds that while no copy of the agreement was presented to the Commissary-General for formal approval, Major Simonds wrote him a letter informing him substantially of its terms, to which he replied, expressing his satisfaction of the progress made; and the court further finds, as a conclusion of law, that the letter of the Commissary-General was a virtual approval of the contract. We are of opinion that, taking all this together, it is a finding by the court as a question of fact that the contract was approved by that officer, and inasmuch as

> neither the instrument itself nor any rule of law prescribes the mode in which this approval shall be evidenced, that a jury would have been justified in finding as the court did.

That the authority of Speed's case does not support the contention and position of appellant's counsel is very apparent, and can not perhaps be better disposed of than by quoting the language of Mr. Chief Justice Nott in delivering the opinion of the Court of Claims in this case (p. 12, Rec.: 35 C. Cls. R., p. 204):

> In *Speed's case* (8 Wall., 77) the Supreme Court held, concerning a contract which in terms provided that it should be subject to the approval of the Commissary-General, that his approval need not be in writing. This court had found from circumstantial evidence that the contract and the performance of the contractors under it were known to the Commissary-General, and that he had indicated his approval by letter to the contracting officer, and the court had held that the contract had been approved. The decision was affirmed by the Supreme Court for the reason that neither the instrument itself nor any rule of law prescribed the mode in which the approval should be evidenced, and that a jury would have been justified in finding as this court had done. In this case the contract likewise contained a provision that "this contract shall be subject to the approval of the Chief of Engineers." But there the resemblance between the two cases ends. In the former case the superior officer impliedly, although indirectly and informally, approved; in this case,

> without laches or delay, he unequivocally disapproved. * * *
>
> As before said, it is not the duty of this court to pass upon the question whether the reason for which the Chief of Engineers disapproved the contract was valid and insufficient. Neither is the court required, by the circumstances of the case, to find whether there was an implied or circumstantial approval of the contract. The action of the Chief of Engineers was certainly prompt and unequivocal. If he had done nothing and had allowed the contractors to proceed with the work, and had approved vouchers for payment as the work progressed, it is probable that the case would be considered as coming within the rule sanctioned by the Supreme Court in Speed's case; but there the written formal contract, the final act of the parties, expressly provided in so many words "that this contract shall be subject to the approval of the Chief of Engineers," and it is impossible for the court to hold that these words meant nothing, or that they meant that a prior contract had been approved by the Chief of Engineers. On the contrary, the court must reiterate the decision in Darragh's case and say that where a contract entered into by a subordinate is in its terms subject to the approval of his superior, approval is a condition precedent to the validity of the agreement.

It is difficult to imagine how the law of the case could be stated more lucidly or soundly than it has been stated by the Court of Claims in this case. The mere acceptance of the bid of the appellants was a

matter purely preliminary to the final execution and approval of the contract and had no binding force or effect prior to the execution and delivery of the contract itself and its final approval by the Chief of Engineers, and that the Chief of Engineers should have directed his subordinate to accept the bid of the claimants was in no sense an approval of the contract, which at that time was not in existence, and which, when subsequently drawn up and presented to the Chief of Engineers, was immediately disapproved by him and the appellants duly and promptly notified accordingly.

As suggested by Mr. Chief Justice Nott, with the validity and sufficiency of the reason or reasons assigned by the Chief of Engineers for his disapproval of the contract, neither this court nor the lower court have anything to do. As this court said in *Speed's case*, *supra* (8 Wall., 83), "where there is a discretion of this kind conferred on an officer or board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract can not be made to depend on the degree of wisdom or skill which may have accompanied its exercise." Citing *Philadelphia & Trenton R. R. Co.* v. *Stimson* (14 Pet., 448); *Martin* v. *Mott* (12 Wheat., 19); *Royal Br. Bank* v. *Turquand* (6 Ellis & Blackburn, 327); *Machleu* v. *Sutherland* (25 Eng. L. & Eq., 114); and *Ross* v. *Reed* (1 Wheat., 482) This doctrine, so repeatedly reiterated by this court, is so sound and well settled that it is not open to question or controversy.

II.

NO IMPLIED CONTRACT.

We have heretofore endeavored to show that there was no express contract between the parties, and inasmuch as if the above condition precedent had been fulfilled the proposed contract would have been an express contract, there is no room for an implied contract in this case. If a contract at all, it was an express contract. In his work on contracts, Story defines an implied contract as follows (sec. 11, 5th ed., Story on Contracts):

> Where the agreement is a matter of inference and deduction it is called an implied contract. Both species of contract, however, are equally founded on the actual agreement of the parties, and the only distinction between them is in regard to the method of proof, which belongs to the law of evidence. In an implied contract the law only supplies that which, although not stated, must be presumed to have been the agreement of the parties.

In the contract in question everything was expressed, and there can be no implication in conflict with what is expressed. (Wharton on Contracts, 1882 ed., paragraphs 708, 709, and cases there cited.) It is also a well-settled principle of law that an implied contract does not arise from the expectation of the parties. (*Maryland* v. *R. R. Co.*, 22 Wall., 105.)

III.

NO QUANTUM MERUIT.

In this case there can be no quantum meruit, inasmuch as there was no contract, either expressed or implied, and hence no contractual relation existed between the parties, but in any event the findings of the Court of Claims (see finding 8, pp. 11 and 12 of the record) are confined to expense incurred and gains prevented. There were no services rendered or partial completion of work under the proposed contract. As stated by Mr. Chief Justice Nott, in delivering the opinion of the Court of Claims, *supra*, the case is simple, "for the reason that there has been no partial performance of work." Manifestly, then, the question of quantum meruit is eliminated and need not be further considered.

IV.

THE FINDINGS OF FACT.

The learned counsel for the appellant endeavors to secure a purely technical advantage from the language used in the sixth finding of fact heretofore made by the Court of Claims (see p. 11), for the reason that the same speaks of the abrogation of the contract, but this court will not permit any unfair advantage to be taken or injustice to be done either party by reason of language and terms clearly inadvertently used, in view of the unmistakable facts in the case. These plainly appear from the whole record, as well as the opinion of the court, to which attention has heretofore been called.

Appellants' counsel takes further exception to the language contained in the opinion of the chief justice of the Court of Claims wherein he says that "the Chief of Engineers unequivocally disapproved the contract," and states that the findings do not show such action.

The findings nowhere show the approval of the contract as required by the contract itself. A copy of said contract is attached to and made a part of the petition and record in this case, and in its last provision says, "This contract shall be subject to the approval of the Chief of Engineers, U. S. A." The petition itself nowhere alleges that said contract was approved by the Chief of Engineers, and leaves the presumption against the pleader, namely, that said contract was never approved.

Furthermore the record shows (p. 8) that this case came before the lower court on a motion to quash the petition and dismiss the case, on the ground "that this action is founded on a contract, a copy of which is annexed to the said petition and made a part thereof, which contains a specific provision of the tenor and effect, as follows: 'This contract shall be subject to the approval of the Chief of Engineers U. S. A.' Not only does the contract itself, a copy of which is attached as above, fail to show that the same was never approved by the Chief of Engineers, U. S. A., but the testimony in the case fully and conclusively shows, and the same is not denied by the claimant, that said contract has never been approved by the said Chief of Engineers, U. S. A., in any manner whatsoever."

This motion was argued *in extenso* before the court by counsel for both parties, and all of the claimant's testimony having been taken the same was brought to the attention of and fully considered by the court, and thereupon, after said hearing, the lower court sustained the Government's motion, and dismissed the petition of the claimant, *all of which the record in this case fully discloses.*

The conclusion is therefore irresistible that this action of the Court of Claims, founded as it is upon a motion which demanded the dismissal of the petition of the claimant *on the sole ground and for the single reason that "the contract was never approved by the Chief of Engineers,"* is clearly tantamount to a finding of fact by the Court of Claims that the contract was not approved by said officer, and should be so treated, considered, and adjudged by this court.

In compliance with rule 4 of this court, the Court of Claims made and filed formal findings of fact in conjunction with their conclusions of law, explaining said action, as follows:

> Inasmuch as the claimants may wish to appeal and the evidence can not go up, this court will now find the facts and assess the damages which the claimants have suffered. The findings will then be, to all intents and purposes, a verdict taken *subject to the opinion of the court.* (Rec., p. 14.) (The italics are ours.)

So that the record in this case conclusively shows that the contract in question was never approved by the Chief of Engineers, U. S. A.

Counsel for the defendant, while convinced that the findings of fact herein and record accompanying the same sufficiently state the facts, yet to eliminate all question as to their sufficiency and obviate the necessity for argument in this court upon this question, filed a motion for a new trial and to amend the findings of fact in the Court of Claims, which motion, on December 2, 1901, was overruled, and a copy of the court's opinion therein is annexed to this brief as an appendix, and this court's attention is directed to the same, as well as to the reasons which induced the Court of Claims to overrule said motion.

As to the real facts in the case, however, there can be no question, and that the contract in question was never approved, either directly or indirectly, actually, circumstantially, or inferentially, by the Chief of Engineers, is also beyond the pale of doubt, and inasmuch as the petition nowhere recites the approval of this contract by the Chief of Engineers, neither do the findings of fact recite its approval by the Chief of Engineers, and inasmuch as this case comes to this court on an appeal from a final judgment rendered by the Court of Claims sustaining a motion made on behalf of the United States in said court to quash the petition filed therein and dismiss the case, for the reason that the contract was never approved by the Chief of Engineers, and inasmuch as both opinions of the Court of Claims fully sustain, explain, and support this fact it is respectfully submitted that this controlling fact is fully and sufficiently stated.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

FRANKLIN W. COLLINS,
Special Attorney.

LOUIS H. PRADT,
Assistant Attorney-General.

APPENDIX.

Court of Claims, No. 20003.

(Decided December 2, 1901.)

SAMUEL MONROE AND DAVID M. RICHARDSON *v.* THE UNITED STATES.

NOTT, Ch. J., delivered the opinion of the court:

Judgment was rendered in this case on the 26th of February, 1900, in favor of the defendants (35 C. Cls. R., 199). The claimants appealed and the case is pending in the Supreme Court upon appeal.

The defendants now come into this court and move the court to set aside the judgment heretofore rendered in their favor and to grant a new trial thereon "under and by virtue of the provisions of section 1088 of the Revised Statutes," which authorizes the court to grant a new trial at any time within two years after the rendition of a judgment where "any fraud, wrong, or injustice in the premises has been done to the United States."

As the judgment was wholly in favor of the United States, it can not be said that "fraud, wrong, or injustice" was done them by it. Apart from the statute, the court has no jurisdiction of the case. Jurisdiction was lost when the record of appeal was sent up. (*Ex parte Russell*, 13 Wall. R., 664, 670; *Ex parte Roberts*, 15 id., 384, 387.)

If the findings do not sufficiently present the questions of law involved, the proper course for the defendants to pursue is to apply to the Supreme Court for an order remanding the case, or requiring this court to find the additional facts; and if the Supreme Court is of the opinion that the facts sought are necessary to the proper consideration of the case, and that the defendants are entitled to have them found, relief will undoubtedly be granted (*Raymond's Case*, 11 C. Cls. R., 477, 491; *United States* v. *Adams*, 9 Wall. R., 661.)

It is proper, however, to add, that if the motion be left to the discretion of this court no amendment of the findings is deemed necessary. The only point involved in the case, and the only fact really sought by the defendants, is a formal finding that the contract was not approved by the Chief of Engineers. We are of the opinion that that fact sufficiently appears upon the record.

In the first place, the contract is set up by the claimants and annexed to their petition. The contract so set up in its last provision says: "This contract shall be subject to approval of the Chief of Engineers, U. S. A." The petition sets up nothing more, and leaves the presumption against the pleader, namely, that the contract never was approved.

In the second place, the case was brought before the court by the claimants' motion to dismiss the petition upon the ground "that this action is founded on a contract, a copy of which is annexed to the said petition and made a part thereof, which contains a specific provision of the tenor and effect as follows: 'This contract shall be subject to approval of the Chief of Engineers, U. S. A.'" The motion also avers that "the testimony in the case fully and conclusively shows, and

the same is not denied by the claimants, that said contract has never been approved by the said Chief of Engineers." The defendants requested no findings of fact. The requests made by the claimants were treated by both parties as correctly setting forth the facts involved. The court accordingly adopted them without objection, treating the motion as a demurrer to the evidence, allowed it, and dismissed the petition. The motion, with its allowance by the court, is a part of the record, and sets forth the fact desired as fully as it could be done by a formal finding of the fact.

The motion of the defendants is overruled.